whether "the goods were not in like good order and condition" when being off-loaded at Penang, the plaintiffs sought to prove this by the evidence of PW1, the materials manager of the plaintiff company, and a Lloyd's Survey Report dated July 11 to which was attached a Chemist's Report dated July 8, 1977.

PW1's evidence was that the container was brought into the plaintiffs' yard from the container yard of the Penang Port Commission on June 24, 1977. At that time the container had no shippers' seal, it apparently having been broken by the Customs, but it had a customs seal. He himself was not present when the container was opened. He was, however, sent for soon after by the storekeeper who had opened the container, and it was then that he saw the damage to the goods. I found him and his evidence unsatisfactory. As for the Lloyd's Report, evidence was given by PW2, an employee of Trident Malaysia Sendirian Berhad, Surveyors and Lloyd's agents in Penang. He conducted the survey on June 25, 1977 at the plaintiffs' factory premises. The Report was signed not by PW2 but by the Administration Manager of the Company, which I found somewhat surprising, particularly as the survey was not conducted on the instruction and/or supervision of the person who had signed the Report. A further unsatisfactory aspect of the Survey Report was that no weight could be given to the Chemist's Report as the Chemist whom I would have thought was a most material witness was not called to give evidence. There was therefore no satisfactory evidence as to how the damage to the goods had been sustained. In the event, on a balance of probabilities the damage, in my view, took place some time after the container was off-loaded at Penang and before the Surveyors were called in on June 25, 1977.

This being the view I have taken of this case on yet another ground I must therefore dismiss the plaintiffs' claim with costs.

Claim dismissed.

Solicitors: *Karthigesu & Arul; Drew & Napier.*

GOH YA TIAN v. TAN SONG GOU & ORS.

[A.C.J. (Lai Kew Chai J.) August 27, 1981]
[Singapore — District Court Appeal No. 82 of 1980]

Practice and Procedure — Agreed bundle of documents — Part of evidence before court — Admission without formal proof — Police reports in agreed bundle — Submission of no case to answer — Defendant put to election whether to call evidence or not — Negligence — Proof of — Res Ipsa Loquitur.

Tort — Negligence — Car hit from behind — Balance of probabilities.

This was an appeal from the decision of the learned Magistrate who dismissed the claim of the appellant for damages suffered by the appellant's taxi. At the trial an agreed bundle of documents and photographs was by agreement admitted into evidence. The bundle contained police reports of the driver of the taxi, the driver of the crane and the driver of the pick-up which were involved in the accident. From the reports it appeared that the taxi was hit in the rear by the pick-up when it was either stationary or was moving forward very slowly. It appeared also that the pick-up was knocked from behind by the crane. Only the appellant gave evidence at the trial and at the close of the appellant's case all three respondents submitted that there was no case for them to meet. They were put to an election by the learned Magistrate and they elected not to give evidence if the decision on the submission was against them. The learned Magistrate dismissed the claim of the appellant and he appealed.

Held: (1) the documents in the agreed bundle were admitted into evidence by consent without production of the maker or the originals and the contents formed part of the evidence before the court;

(2) the police reports in the agreed bundle formed part of the evidence adduced by the appellant at the trial and on the basis of those reports it must be found that the appellant's taxi was at the material time either stationary or was moving slowly ahead when it was collided into the rear portion by the pick-up;

(3) the balance of probabilities in this case was in favour of both the pick-up driver and the crane driver being negligent;

(4) if a judge is asked to rule at the end of the plaintiff's case that the plaintiff has made no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence.

Cases referred to:-

(1) *Yap Choo Hoo* v. *Tahir bin Yasin & Anor.* [1970] 2 M.L.J. 138.

(2) *Henry Trading Co. Ltd.* v. *Harun* [1966] 2 M.L.J. 281.

(3) *Baker* v. *Market Harborough Industrial Co-operative Limited* [1953] 1 W.L.R. 1472.

(4) *France* v. *Parkinson* [1954] 1 All E.R. 739.

(5) *U.N. Pandey* v. *Hotel Marco Polo Pte. Ltd.* [1980] 1 M.L.J. 4.

(6) *Simirah* v. *Chua Hock Lee & Anor.* [1963] M.L.J. 239, 241.

DISTRICT COURT APPEAL.

Joseph Gay for the appellant.

Simon Yuen for 1st respondent.

Tan Tee Jim for 2nd and 3rd respondents.

Cur. Adv. Vult.

Lai Kew Chai J.: This is an appeal against the decision of the learned Magistrate who dismissed the claim of the appellant for the sum of $1,132.20 being the agreed damages suffered by the appellant's taxi. The claim was against the 1st respondent as the owner and driver of motor pickup GF 6797 E. The 2nd respondent was sued as the registered owner of a trade plate bearing No. 0857 S which was attached to a motor crane bearing No. GS 13278. The motor crane was owned by the 3rd respondent and the appellant claimed that it was driven by one Abdullah bin Haji Bakar as the servant or agent of the 2nd or 3rd respondents.

Although the sum at stake is small, this appeal raises important questions as to the practice and evidential effect of documents which are agreed by parties in a litigation to be included in an Agreed Bundle, the court's application of the principles of logic and commonsense to circumstances surrounding a collision which do not infrequently arise and the practice of a trial judge before whom a submission is made that the plaintiff not having made out a case, the defendant has no case to answer.

Only the appellant gave evidence at the trial. He was the owner of motor taxi SH 4490. He hired out the taxi to one Tan Ah Lek for a specific sum. The hire was not dependent on Tan Ah Lek's earnings. The appellant alleged in evidence that Tan Ah Lek was not employed by him. At about 3.30 p.m. on June 21, 1978 the taxi, whilst in the charge of Tan Ah Lek, was involved in a motor accident. The taxi was later repaired for $802.20. The appellant also said in evidence that since the commencement of the proceedings he had tried to locate Tan Ah Lek to give evidence but was unsuccessful. This is the entire effect of his evidence. He was not cross-examined by any of the three respondents. The appellant did not and indeed could not call any other oral evidence as he had not witnessed the collision.

At the commencement of the trial, an Agreed Bundle of documents and photographs was by agreement admitted into evidence and marked as Exhibits "AB1-16". The first three documents were certified true copies of the Police Reports of Tan Ah Lek, Abdullah bin Haji Bakar ("the crane driver") and Tan Song Gou ("the pickup driver"). Tan Ah Lek said in his police report that at the time of the accident along Jurong Port Road his taxi was "hit from the rear by Datsun Pickup GF 6797 E". The "rear portion" of the taxi was dented. No one was injured. The crane driver's report disclosed that he was driving the crane along Jurong Port Road towards the Port Road circus. Before approaching the Jurong Interchange, there was a traffic jam. When traffic in front of him moved forward, there was a car space in front of him. The pickup driver driving motor pickup GF 6797 E overtook him and swerved into the empty space. At that moment the traffic in front came to a halt. He said "as a result" the crane knocked into the rear left corner of the pickup. The crane was not damaged.

The pickup driver's version is this. He said he was following the taxi. When the traffic ahead of him stopped, he did likewise. Whilst waiting for the traffic in front of him to move on, he was knocked from behind by the crane. The impact forced his pickup forward and it knocked into and damaged the rear of the taxi.

One gets the clear picture from the reports that the pickup had collided into the rear of the taxi which was either stationary or was moving forward very slowly. Whether the pickup was stationary behind the taxi and was hit from behind by the crane or whether the pickup had swerved into the open space and path of the crane is clearly a matter between them. As far as the taxi is concerned, it is clear the pickup had collided into its rear.

The other documents in the Agreed Bundle principally related to the damage of the taxi and the pickup and the repairs of the taxi. As quantum was agreed, I need not dwell on them save to underscore the fact that the descriptions and photographs of the damage to the taxi and the pickup confirmed the picture of the pickup having collided into the rear of the taxi.

At the close of the appellant's case, all three respondents submitted that there was no case for them to meet. They were put to an election by the learned Magistrate (as to which I shall have to return to later) and they all submitted no case to answer and elected not to give any evidence if the decision on the submission went against them.

Counsel for the 1st respondent, Mr. Simon Yuen, submitted that although the police reports were included in the Agreed Bundle and admitted into evidence, all that was agreed was the authenticity of the documents. The contents of the documents were not agreed and the police reports do not prove the facts. He asserted that the makers of the documents or the driver of the taxi had to be called to prove the facts. He relied on *Yap Choo Hoo* v. *Tahir bin Yasin & Anor.*[1] If this submission is right, there would be no evidence to how the accident had occurred. Counsel for the 2nd and 3rd respondents associated himself with these arguments but at the trial he also complained that he had no chance to cross-examine Tan Ah Lek if the court could rely on Tan Ah Lek's police report as evidence.

In *Yap Choo Hoo* v. *Tahir bin Yasin & Anor.*[1] it was held by Mr. Justice Sharma that a document even forming part of an Agreed Bundle has got to be proved, although it need not be formally and strictly proved. Even if one understands the qualification of this decision (as to which I am not sure), I must respectfully disagree with his reasoning which was delivered orally. I am afraid that the learned judge had mis-read the effect of Practice Note 1 of 1948 ([1948] M.L.J. xiv) which was issued by the Registrar of the Supreme Court of the then Malayan Union and which still has effect in Singapore today. The note is in the following terms: —

> "In civil suits in the Supreme Court where an advocate and solicitor is engaged on either side, it is his duty to assist the court by presenting documentary evidence in the most convenient possible manner. In most cases it is possible to agree the majority of documents which will be required in evidence. In every such case they should be so agreed and copies should then be typed and made up in a proper bundle bound and paged in order of date. In all cases where documents cannot be agreed copies must be available and can conveniently be bound and paged in another bundle. As regards agreed documents, the court need not be troubled to see the originals at all. As regards disputed documents, it will be necessary to prove or attempt to prove them; but the court should be given a copy for the judge's use and a copy for the file and all counsel should for convenience be furnished with copies in the same format. The expenses of such copies of relevant documents can properly be allowed on taxation. If the steps outlined above are not taken, much time is wasted and great inconvenience ensues. . . ."

He underlined the words: "In most cases it is possible to agree the majority of documents which will be required in evidence." I am afraid his emphasis on this sentence and on the words "will be required in evidence" had led him astray. As a result, the learned judge failed to appreciate that the documents are admitted into evidence without formal proof. They do form part and parcel of the evidence. As the practice note clearly says: "As regards agreed documents, the court need not trouble to see the originals at all." He was also revolted by the proposition that once a document forms part of the agreed bundle of documents it automatically proves itself without any formal production of the original

or a copy thereof or without any witness tendering it or producing it in court. He vigorously stated:

"... it would be against all conceptions of justice as the result of it would be that one of the parties would be deprived of the right to cross-examine a witness who would otherwise be required to produce the document even though formally."

With respect again, no question of depriving anybody's right to cross-examine arises. It is all left to agreement between the parties. A party wishing to cross-examine the maker of a document should not agree to its inclusion in the Agreed Bundle or should where convenience dictates at least extract a written undertaking from the other side that the maker would be produced at the trial for cross-examination. This is not to say that the party cannot cross-examine the maker of an agreed document if the maker chooses to give evidence nor that the party in agreeing to the inclusion of a document agrees with what the document purports to say or its evidential value. The party having agreed to the document is perfectly entitled to rebut or reduce the evidential or probative effect of the contents of the document by other evidence. What is clear is that the documents in the Agreed Bundle are admitted into evidence by consent without production of the maker or the originals and the contents do form part of the evidence before the court.

It is also not as though Sharma J. was not aware of what the Federal Court had decided earlier on this matter in *Henry Trading Co. Ltd.* v. *Harun.*[2] It was there said by Wan Suleiman J. at page 282: —

"The other statement of law made by the learned trial judge on which I feel I should comment is that part of the judgment wherein he said that the contents of an agreed bundle of documents must be proved unless such contents are admitted by the other side. With respect, I say that where there is an agreed bundle of documents there is no need to prove these documents. This rule is too well established in law to be doubted."

The other two members of the Federal Court in concuring must be taken to have affirmed this statement and it was not right for Sharma J. to cast any doubt on this. He ought to have followed the decision.

I accordingly hold that the police reports in the Agreed Bundle form part of the evidence adduced by the appellant at the trial and on the basis of those reports I find that the appellant's taxi was at the material time either stationary or was moving slowly ahead when it was collided into at the rear portion by the pickup. Whether the pickup had cut into the crane driver's path or was pushed forward by the crane when the pickup was stationary is a matter for the 1st respondent and the 3rd respondent. In the absence of special circumstances and notwithstanding that the appellant had not relied on the doctrine of *res ipsa loquitur*, I say that the balance of probabilities was in favour of both the pickup driver and the crane driver having been negligent. In coming to this decision, I am also not treating the decisions of the English Court of Appeal in *Baker* v. *Market Harborough Industrial Co-operative Limited*[3] and in *France* v. *Parkinson*[4] as laying down any rule of law but rather as illustrative of the application of the principles of logic and commonsense to the circumstances of this collision which do not infrequently arise. The police reports of both the pickup driver and the crane driver gave me the picture of how the collision had occurred and they were on the balance of probabilities both equally to blame.

The onus which in this case was a fine one had therefore shifted to the 1st and 3rd respondents at the close of the appellant's case. At that stage, they submitted that they had no case to answer. The learned Magistrate put them on the usual election. He, in effect, said to them: "I'm not going to rule on your submission of no case to answer unless you indicate to me that if I should rule against you on your submission you will offer no evidence on your behalf." Was the learned Magistrate right? He was referred to *U.N. Pandey* v. *Hotel Marco Polo Pte. Ltd.*[5] where Sinnathuray J. said by an addenda to his oral judgment: —

"On the subject of no case to answer, a summary of the practice of the Courts of England is to be found in the White Book at 35/7/2. The last time the practice was judicially considered is in the Court of Appeal decision *Storey* v. *Storey* [1963] P. 63 C.A.:

'There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.'

In my judgment, it would be a desirable practice in our courts to allow a submission of no case to answer at the end of the plaintiff's case, without putting the defendant to his election, whether to call evidence or not, if his submission fails. It is trite to say that we have a young legal profession and a fused one. Most are small practitioners and engage in many fields of law. The time and effort put in litigation matters are diffused. Such a practice therefore will ensure not only that there is a thorough preparation of the case before trial, but also a careful presentation of it at the hearing. Altogether, the practice will bring about a saving of costs for the parties."

These pronouncements should have been binding on or at least highly persuasive to the learned Magistrate. Yet he did not follow them and did put all three respondents to the election. Was the learned Magistrate right? It would appear that the Subordinate Courts have often not followed these pronouncements of Sinnathuray J. I have to address myself on this question because if the learned Magistrate was wrong, I would have ordered the learned Magistrate to continue with the trial and allow the 1st respondent and the 3rd respondent to adduce evidence in their favour. However, after careful consideration, I am reluctantly compelled to say that I cannot agree with the pronouncements of Sinnathuray J. Instead of our expeditious disposal of a trial and a saving of costs, I am afraid that the very opposite consequences will ensue if the practice should grow in our courts to allow a submission of no case to answer at the end of the plaintiff's case, without putting the defendant to his election whether to call evidence or not, if his submission fails. A defendant who is not put to an election will not be under any disincentive. He will be encouraged to make a submission of no case to answer, go through the evidence and the law. The plaintiff answers. The defendant replies. Multiply this process in every civil case, the logical conclusion must be that trials are prolonged. I should think that this would be a most undesirable consequence. In my view if a judge is asked to rule at the end of the

plaintiff's case that the plaintiff has made out no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence.

I respectfully adopt what fell from the lips of Thomson C.J. (as he then was) in *Simirah* v. *Chua Hock Lee & Anor.*[6]:

"...the question then arises what this court should do in view of the course taken at the trial by counsel for the defendants when he submitted that there was no case to answer.

It is a great pity that when this submission was made the advice of Goddard, L.J., (as he then was) in the case of *Purry* v. *Aluminium Corporation, Ltd.* 162 L.T.R. 236 was disregarded. His Lordship there observed that in cases of negligence if a judge is asked to rule at the end of the plaintiff's case that the plaintiff had made out no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence. That statement as to the practice which should be followed in such circumstances has been approved again and again (*Laurie* v. *Raglan Building Co. Ltd.* [1942] 1 K.B. 152, 154; *Yuill* v. *Yuill* [1945] P. 15; *Storey* v. *Storey* [1963] P. 63).

In the present case it is unfortunate that counsel who made the submission of no case to answer neglected to refresh the judge's memory on this point. It is equally unfortunate, and even more surprising, that counsel for the plaintiff should also have failed in this regard. In the circumstances I think we have no option so far as the second defendant is concerned but to order a new trial. In my view, for which I have stated my reasons, the submission of no case to answer should have failed and the position would then have had to be considered in the light of the following passage from the judgment of Lord Greene M.R. in the case of *Yuill* v. *Yuill, supra,* (at p. 18):—

'The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election, and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election, and no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission'."

The appeal as against the 1st and 3rd respondents is therefore allowed with costs. Judgment for $1,132.20 should be entered against them with costs both here and below.

As far as the 2nd respondent is concerned, the company was the registered owner of the name plate. The 2nd respondent wrongfully withheld information as to its relationship with the crane driver. It was accordingly joined as a second defendant. The appeal against the 2nd respondent is dismissed, but I make no order as to costs here and below.

Order accordingly.

Solicitors: *Leong & Gay; Khattar, Wong & Partners; Donaldson & Burkinshaw.*

MALAYSIAN REPORTS

K.C. MATHEWS v. KUMPULAN GUTHRIE SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman & Chang Min Tat F.JJ.) November 19, 1980 & June 12, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 65 of 1980]

Labour Law — Clerk appointed on probation — Probationary period extended — Notice that he would not be confirmed and giving one month's notice of termination — Claim for reinstatement or damages for wrongful termination of employment.

In this case the appellant had been appointed as a clerk on probation. As his work was not satisfactory, the probationary period was extended. Subsequently a notice was given to the appellant that he would not be confirmed and he was given one month's notice of termination. He brought an action for reinstatement or alternatively damages for wrongful termination of employment. The learned trial judge dismissed the claim and the appellant appealed. It was urged that (1) at the end of the first probationary period the appellant became confirmed in his appointment unless he was told that he was not confirmed or he would have to undergo a further period of probationary service; (2) the dismissal was bad as there had been no inquiry.

Held, dismissing the appeal: (1) no enquiry needed to be called for in the circumstances of the case. The appellant knew at all times how dissatisfied his employer was with him and the enquiry would have served no useful purpose;

(2) in this case it was clear that as no action had been taken by way of confirmation or by way of termination at the end of the first probationary period, the appellant continued to be in service as a probationer.

Case referred to:-

(1) *Express Newspapers Ltd.* v. *Labour Court & Anor.* A.I.R. 1964 S.C. 806.

FEDERAL COURT.

K. Chandra for the appellant.

W. Abraham for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): At the end of the argument we dismissed the appeal from the dismissal of the plaintiff's claim for reinstatement in his employment, alternatively, for damages for wrongful termination of employment. We now give our reasons.

The facts in this case were not greatly in dispute. By letter dated April 13, 1970, the appellant was appointed a second clerk on an estate belonging to the respondent. The letter of his appointment expressly provided that the appointment was for a probationary period of six months after which period consideration would be given to confirmation, the deciding factor being whether the employer was or was not satisfied with his work. The employment commenced on April 16 and the six months' period ended on October 15, 1970. An assessment was made of the appellant's work at about this time. In all aspects of his work his rating was poor, the only ray of sunshine being his knowledge of work which was rated fair. As for his personal qualities he was either fair or poor and he was only considered good in one respect and that was in his appearance. It was indicated in that report which was dated October 20, 1970, that his shortcomings had been told to him but he had made absolutely no attempt to improve